General Assembly

Amendment

January Session, 2015

LCO No. **8165**

HB06550081 65HDO

Offered by:
REP. ABERCROMBIE, 83rd Dist.
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To: Subst. House Bill No. **6550** File No. 523 Cal. No. 329

"AN ACT CONCERNING MEDICAID PROVIDER AUDITS."

Strike everything after the enacting clause and substitute the following in lieu thereof:

"Section 1. Subsection (d) of section 17b-99 of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2015*):

(d) (1) The Commissioner of Social Services, or any entity with which the commissioner contracts, for the purpose of conducting an audit of a service provider that participates as a provider of services in a program operated or administered by the department pursuant to this chapter or chapter 319t, 319v, 319y or 319ff, except a service provider for which rates are established pursuant to section 17b-340, shall conduct any such audit in accordance with the provisions of this subsection. For purposes of this subsection, (A) "audit look-back

period" means a period of time not to exceed thirty-six months from the date of an audit to the date of payment of a provider's claim; (B) "clerical error" means an unintentional typographical, scrivener's or computer error or an error in recordkeeping in which documentation supporting a claim exists and can be produced but was misfiled at the time of the audit; (C) "extrapolation" means the determination of an unknown value by projecting the results of the review of a sample to the universe from which the sample was drawn; (D) "ninety-five per cent confidence level" means there is a probability of at least ninety-five per cent that the result is reliable; (E) "provider" means a person, public agency, private agency or proprietary agency that is licensed, certified or otherwise approved by the commissioner to supply services authorized by the programs set forth in said chapters; (F) "sample stratification" means a method of sampling that involves the division of a population into smaller groups known as strata based on shared attributes or characteristics; (G) "statistically valid sampling and extrapolation methodology" means a methodology that is (i) validated by a statistician who has completed graduate work in statistics and has significant experience developing statistically valid samples and extrapolating the results of such samples on behalf of government entities, (ii) provides for the exclusion of highly unusual claims that are not representative of the universe of paid claims, (iii) has a ninety-five per cent confidence level or greater, and (iv) includes sample stratification when applicable; and (H) "universe" means a defined population of paid claims submitted by a provider during a specific time period.

[(1)**]** (2) Not less than thirty days prior to the commencement of any such audit, the commissioner, or any entity with which the commissioner contracts to conduct an audit of a participating provider, shall provide written notification of the audit to such provider and the statistically valid sampling and extrapolation methodology to be used in conducting such audit, unless the commissioner, or any entity with which the commissioner contracts to conduct an audit of a participating provider makes a good faith determination that (A) the

health or safety of a recipient of services is at risk; or (B) the provider is engaging in vendor fraud. A copy of the regulations established pursuant to subdivision (11) of this subsection shall be appended to such notification. At the commencement of the audit, the commissioner, or any entity with which the commissioner contracts to conduct an audit of a participating provider, shall disclose (i) the name and contact information of the assigned auditor or auditors, (ii) the audit location, including notice of whether such audit shall be conducted on-site or through record submission, and (iii) the manner by which information requested shall be submitted.

[(2)**]** (3) Any clerical error **[**, including, but not limited to, recordkeeping, typographical, scrivener's or computer error,**]** discovered in a record or document produced for any such audit shall not of itself constitute a wilful violation of program rules unless proof of intent to commit fraud or otherwise violate program rules is established. In determining which providers shall be subject to audits, the Commissioner of Social Services **[**may**]** shall give consideration to the history of a provider's compliance in addition to other criteria used to select a provider for an audit.

[(3)**]** (4) A finding of overpayment or underpayment to a provider in a program operated or administered by the department pursuant to this chapter or chapter 319t, 319v, 319y or 319ff, except a provider for which rates are established pursuant to section 17b-340, shall not be based on extrapolation unless **[**(A) there is a determination of sustained or high level of payment error involving the provider, (B) documented educational intervention has failed to correct the level of payment error, or (C) the value of the claims in aggregate exceeds two hundred thousand dollars on an annual basis.**]** (A) the extrapolated overpayment calculated from a statistically valid sampling and extrapolation methodology exceeds five per cent of total claims paid for the audit period; and (B) the commissioner determines the provider has a sustained or high level of payment error or documented educational intervention has failed to correct a previously determined

sustained or high level of payment error. Such determination may be made by means that include, but are not limited to: (i) Audit history of a provider, (ii) analysis of additional samples using a statistically valid sampling and extrapolation methodology, (iii) information from law enforcement investigations, and (iv) allegations of wrongdoing by current or former employees of a provider. The commissioner shall not extrapolate an overpayment based on a clerical error unless the provider has a history of at least one previous overpayment error identified in an audit or the clerical error exceeds ten per cent of a statistically valid sample. An overpayment assessment based on extrapolation of a clerical error shall not exceed three times the dollar amount of the clerical error unless the commissioner determines the provider has a sustained or high level of payment error or documented educational intervention has failed to correct a previously determined sustained or high level of payment error. When the commissioner determines that a sustained or high level of payment error occurred, the commissioner shall describe the basis for such finding in the preliminary written report and in the final report issued pursuant to subdivisions (6) and (8) of this subsection.

[(4)**]** (5) A provider, in complying with the requirements of any such audit, shall be allowed not less than thirty days to provide documentation in connection with any discrepancy discovered and brought to the attention of such provider in the course of any such audit. Such documentation may include evidence that errors concerning payment and billing resulted from a provider's transition to a new payment or billing service or accounting system. The commissioner may permit a provider to correct clerical errors prior to a final audit determination. The commissioner shall not calculate an overpayment based on extrapolation or attempt to recover such extrapolated overpayment when the provider presents credible evidence that an error by the commissioner, or any entity with which the commissioner contracts to conduct an audit pursuant to this subsection, caused the overpayment, provided the commissioner may recover the amount of the original overpayment.

[(5)**]** (6) The commissioner, or any entity with which the commissioner contracts, for the purpose of conducting an audit of a provider of any of the programs operated or administered by the department pursuant to this chapter or chapter 319t, 319v, 319y or 319ff, except a service provider for which rates are established pursuant to section 17b-340, shall produce a preliminary written report concerning any audit conducted pursuant to this subsection, and such preliminary report shall be provided to the provider that was the subject of the audit not later than sixty days after the conclusion of such audit. If a preliminary finding of an overpayment based on extrapolation exceeds two hundred thousand dollars, the commissioner shall schedule a conference with the provider not later than thirty days after the conclusion of such audit. Not later than thirty days after such conference, a provider may conduct an independent audit at the provider's expense of (A) all of the claims included in the universe subject to findings based on extrapolation, or (B) a second sample twice the size of the original identified by the department using the same statistically valid sampling and extrapolation methodology. The commissioner may reject any audit not based on a statistically valid sampling and extrapolation methodology or not in compliance with state or federal law. The commissioner shall amend the preliminary report in accordance with any verified evidence that initial findings were incorrect.

[(6)**]** (7) The commissioner, or any entity with which the commissioner contracts, for the purpose of conducting an audit of a provider of any of the programs operated or administered by the department pursuant to this chapter or chapter 319t, 319v, 319y or 319ff, except a service provider for which rates are established pursuant to section 17b-340, shall, following the issuance of the preliminary report pursuant to subdivision **[**(5)**]** (6) of this subsection, hold an exit conference with any provider that was the subject of any audit pursuant to this subsection for the purpose of discussing the preliminary report. Such provider may present evidence at such exit conference refuting findings in the preliminary report if such provider

has not already done so pursuant to subdivision (6) of this subsection.

[(7)**]** (8) The commissioner, or any entity with which the commissioner contracts, for the purpose of conducting an audit of a service provider, shall produce a final written report concerning any audit conducted pursuant to this subsection. Such final written report shall be provided to the provider that was the subject of the audit not later than sixty days after the date of the exit conference conducted pursuant to subdivision **[**(6)**]** (7) of this subsection, unless the commissioner, or any entity with which the commissioner contracts **[**,**]** for the purpose of conducting an audit of a service provider, agrees to a later date or there are other referrals or investigations pending concerning the provider.

[(8)**]** (9) Any provider aggrieved by a decision contained in a final written report issued pursuant to subdivision **[**(7)**]** (8) of this subsection may, not later than thirty days after the receipt of the final report, request, in writing, a **[**review on all items of aggrievement**]** contested case hearing in accordance with chapter 54. Such request shall contain a detailed written description of each specific item of aggrievement. The designee of the commissioner who presides over the **[**review**]** hearing shall be impartial and shall not be an employee of the Department of Social Services Office of Quality Assurance or an employee of an entity with which the commissioner contracts for the purpose of conducting an audit of a service provider. A provider shall be permitted to raise at any time during such hearing that such provider's compliance with a state or federal law or regulation explains or negates a negative finding in an audit. Following review on all items of aggrievement, the designee of the commissioner who presides over the **[**review**]** hearing shall, notwithstanding the provisions of section 4-180, issue a final decision not later than sixty days following the close of evidence or the date on which final briefs are filed, whichever occurs later. When a provider requests a hearing pursuant to this subdivision, and the provider is contesting an overpayment amount based on extrapolation, the Department of Social

Services shall not recoup the overpayment amount at issue until a final decision is issued after the hearing.

[(9) A provider may appeal a final decision issued pursuant to subdivision (8) of this subsection to the Superior Court in accordance with the provisions of chapter 54.**]**

(10) The provisions of this subsection shall not apply to any audit conducted by the Medicaid Fraud Control Unit established within the Office of the Chief State's Attorney.

(11) The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, **[**to carry out the provisions of this subsection and to ensure the fairness of the audit process, including,**]** that include but are not limited to, (A) definitions of the sampling and extrapolation methodologies associated with the process, (B) limitations on audits to cover only paid claims and, whenever possible, the isolation of unique or rare claims from others in any sample subject to extrapolation, (C) the application of a median rather than an average in any extrapolation involving claims with multiple services, (D) an audit look-back period in accordance with this subsection, and (E) administrative appeal procedures set forth in a manner that is consistent with the provisions of chapter 54.

(12) The commissioner shall provide free training to providers on how to enter claims to avoid **[**clerical**]** errors and shall post information on the department's Internet web site concerning the auditing process and methods to avoid clerical errors. Not later than February 1, 2015, the commissioner shall establish and publish on the department's Internet web site audit protocols to assist the Medicaid provider community in developing programs to improve compliance with Medicaid requirements under state and federal laws and regulations, provided audit protocols may not be relied upon to create a substantive or procedural right or benefit enforceable at law or in equity by any person, including a corporation. The commissioner shall establish audit protocols for specific providers or categories of service,

including, but not limited to: (A) Licensed home health agencies, (B) drug and alcohol treatment centers, (C) durable medical equipment, (D) hospital outpatient services, (E) physician and nursing services, (F) dental services, (G) behavioral health services, (H) pharmaceutical services, **[**and**]** (I) emergency and nonemergency medical transportation services, and (J) not later than January 1, 2016, homemaker companion services. The commissioner shall ensure that the Department of Social Services, or any entity with which the commissioner contracts to conduct an audit pursuant to this subsection, has on staff or consults with, as needed, a medical or dental professional who is experienced in the treatment, billing and coding procedures used by the provider being audited.

Sec. 2. Section 17b-99a of the general statutes is repealed and the following is substituted in lieu thereof (*Effective July 1, 2015*):

(a) (1) For purposes of this section, (A) "audit period" means a period of time not later than thirty-six months from the required filing deadline of the annual cost report of a long-term care facility; (B) "clerical error" means an unintentional typographical, scrivener's or computer error or an error in recordkeeping in which documentation supporting a claim or cost exists and can be produced but has been misfiled at the time of an audit; (C) "extrapolation" means the determination of an unknown value by projecting the results of the review of a sample to the universe from which the sample was drawn, **[**(B)**]** (D) "facility" means any facility described in this subsection and for which rates are established pursuant to section 17b-340, (E) "ninety-five per cent confidence level" means there is a probability of at least ninety-five per cent that the result is reliable; (F) "sample stratification" means a method of sampling that involves the division of a population into smaller groups known as strata based on shared attributes or characteristics; (G) "statistically valid sampling and extrapolation methodology" means a methodology that is (i) validated by a statistician who has completed graduate work in statistics and has significant experience developing statistically valid samples and

extrapolating the results of such samples on behalf of government entities, (ii) provides for the exclusion of highly unusual claims that are not representative of the universe of paid claims, (iii) has a ninety-five per cent confidence level or greater, and (iv) includes sample stratification when applicable, and **[**(C)**]** (H) "universe" means a defined population of paid claims submitted by a facility during a specific time period.

(2) The Commissioner of Social Services, or any entity with which the commissioner contracts to conduct an audit pursuant to this section, shall conduct any audit of a licensed chronic and convalescent nursing home, chronic disease hospital associated with a chronic and convalescent nursing home, a rest home with nursing supervision, a licensed residential care home, as defined in section 19a-490, and a residential facility for persons with intellectual disability which is licensed pursuant to section 17a-227 and certified to participate in the Medicaid program as an intermediate care facility for individuals with intellectual disabilities in accordance with the provisions of this section. The commissioner shall conduct such audit within the audit period and only for an annual cost report of a long-term care facility used to generate a base year or interim rate. The commissioner, in the absence of any state or federal law or regulation imposing a specific limit on the allowability of a particular cost item, shall rely on federal Medicare principles for the determination of reasonable costs. The commissioner shall recognize all relevant documentation in the determination of allowable costs and, to the extent permissible under federal Medicaid law and regulations, shall allow any costs incurred to comply with state or federal mandates. The commissioner shall not disallow any cost or claim based on failure to utilize a particular cost-reporting methodology if the facility presents credible evidence that the cost report was filed in accordance with methodology previously accepted by the commissioner with no subsequent notice by the commissioner of a change to such accepted methodology.

(b) Not less than thirty days prior to the commencement of any such

audit, the commissioner shall provide written notification of the audit to such facility and the statistically valid sampling and extrapolation methodology to be used, unless the commissioner makes a good-faith determination that (1) the health or safety of a recipient of services is at risk; or (2) the facility is engaging in vendor fraud under sections 53a-290 to 53a-296, inclusive.

(c) Any clerical error **[**, including, but not limited to, recordkeeping, typographical, scrivener's or computer error,**]** discovered in a record or document produced for any such audit **[**,**]** shall not of itself constitute a wilful violation of the rules of a medical assistance program administered by the Department of Social Services unless proof of intent to commit fraud or otherwise violate program rules is established. In determining which facilities shall be subject to audits, the Commissioner of Social Services **[**may**]** shall give consideration to the history of a facility's compliance in addition to other criteria used to select a facility for an audit.

(d) A finding of overpayment or underpayment to such facility shall not be based on extrapolation unless **[**(1) there is a determination of sustained or high level of payment error involving the facility, (2) documented educational intervention has failed to correct the level of payment error, or (3) the value of the claims in aggregate exceeds two hundred thousand dollars on an annual basis.**]** (1) the extrapolated overpayment calculated from a statistically valid sampling and extrapolation methodology exceeds five per cent of total claims paid or costs allowed for the audit period; and (2) the commissioner determines the facility has a sustained or high level of payment error or documented educational intervention has failed to correct a previously determined sustained or high level of payment error. Such determination may be made by means that include, but are not limited to: (A) Audit history of a facility, (B) analysis of additional samples using a statistically valid sampling and extrapolation methodology, (C) information from law enforcement investigations, and (D) allegations of wrongdoing by current or former employees of a facility. The

commissioner shall not extrapolate an overpayment based on a clerical error unless the facility has a history of at least one previous overpayment error identified in an audit or the clerical error exceeds ten per cent of a statistically valid sample. An overpayment assessment based on extrapolation of a clerical error shall not exceed three times the dollar amount of the clerical error unless the commissioner determines the facility has a sustained or high level of payment error or documented educational intervention has failed to correct a previously determined sustained or high level of payment error. When the commissioner determines that a sustained or high level of payment error occurred, the commissioner shall describe the basis for such finding in the preliminary written report and the final report issued pursuant to subsections (f) and (h) of this subsection.

(e) A facility, in complying with the requirements of any such audit, shall be allowed not less than thirty days to provide documentation in connection with any discrepancy discovered and brought to the attention of such facility in the course of any such audit. Such documentation may include evidence that errors concerning payment and billing resulted from a facility's transition to a new payment or billing service or accounting system. The commissioner may permit a facility to correct clerical errors prior to a final audit determination. The commissioner shall not calculate an overpayment based on extrapolation or attempt to recover such extrapolated overpayment when the facility presents credible evidence that an error by the department caused the overpayment, provided the commissioner may recover the amount of the original overpayment.

(f) The commissioner shall produce a preliminary written report **[**concerning any audit conducted pursuant to this section**]** of any proposed rate adjustments resulting from the audit and a draft rate computation report that includes the impact of proposed adjustments and such preliminary report shall be provided to the facility that was the subject of the audit not later than sixty days after the conclusion of such audit. If a preliminary finding of an overpayment based on

extrapolation of a clerical error exceeds two hundred thousand dollars, the commissioner shall schedule a conference with the facility's representatives not later than thirty days after the conclusion of such audit. Not later than thirty days after such conference, a facility may conduct an independent audit at the facility's expense of (1) all of the claims included in the universe subject to findings based on extrapolation, or (2) a second sample twice the size of the original identified by the department using the same statistically valid sampling methodology. The commissioner may reject any audit not based on a statistically valid sampling methodology or not in compliance with state or federal law. The commissioner shall amend the preliminary report in accordance with any verified evidence that initial findings were incorrect.

(g) The commissioner shall, following the issuance of the preliminary report pursuant to subsection (f) of this section, hold an exit conference with any facility that was the subject of any audit pursuant to this subsection for the purpose of discussing the preliminary report. Such facility may present evidence at such exit conference refuting findings in the preliminary report if such facility has not already done so pursuant to subsection (f) of this section.

(h) The commissioner shall produce a final written report concerning any audit conducted pursuant to this **[**subsection**]** section. Such final written report shall be provided to the facility that was the subject of the audit not later than sixty days after the date of the exit conference conducted pursuant to subsection (g) of this section, unless the commissioner and the facility agree to a later date or there are other referrals or investigations pending concerning the facility.

(i) Any facility aggrieved by a final report issued pursuant to subsection (h) of this section may request a **[**rehearing**]** hearing. A **[**rehearing**]** hearing shall be held by the commissioner or the commissioner's designee, provided a detailed written description of all items of aggrievement in the final report is filed by the facility not later than ninety days following the date of written notice of the

commissioner's decision. The **[**rehearing**]** hearing shall be held not later than thirty days following the date of filing of the detailed written description of each specific item of aggrievement. The commissioner shall issue a final decision not later than sixty days following the close of evidence or the date on which final briefs are filed, whichever occurs later. Any items not resolved at such **[**rehearing**]** hearing to the satisfaction of the facility or the commissioner shall be submitted to binding arbitration by an arbitration board consisting of one member appointed by the facility, one member appointed by the commissioner and one member appointed by the Chief Court Administrator from among the retired judges of the Superior Court, which retired judge shall be compensated for his services on such board in the same manner as a state referee is compensated for his services under section 52-434. The proceedings of the arbitration board and any decisions rendered by such board shall be conducted in accordance with the provisions of the Social Security Act, 42 USC 1396, as amended from time to time, and chapter 54. In any case involving an extrapolated error, the department shall not subject the facility to an overpayment assessment or recoupment order that exceeds the amount of the original error until the facility exhausts any rights pursuant to this section.

(j) The submission of any false or misleading fiscal information or data to the commissioner shall be grounds for suspension of payments by the state under sections 17b-239 to 17b-246, inclusive, and sections 17b-340 and 17b-343, in accordance with regulations adopted by the commissioner. In addition, any person, including any corporation, who knowingly makes or causes to be made any false or misleading statement or who knowingly submits false or misleading fiscal information or data on the forms approved by the commissioner shall be guilty of a class D felony.

(k) The commissioner, or any agent authorized by the commissioner to conduct any inquiry, investigation or hearing under the provisions of this section, shall have power to administer oaths and take

testimony under oath relative to the matter of inquiry or investigation. At any hearing ordered by the commissioner, the commissioner or such agent having authority by law to issue such process may subpoena witnesses and require the production of records, papers and documents pertinent to such inquiry. If any person disobeys such process or, having appeared in obedience thereto, refuses to answer any pertinent question put to the person by the commissioner or the commissioner's authorized agent or to produce any records and papers pursuant thereto, the commissioner or the commissioner's agent may apply to the superior court for the judicial district of Hartford or for the judicial district wherein the person resides or wherein the business has been conducted, or to any judge of such court if the same is not in session, setting forth such disobedience to process or refusal to answer, and such court or judge shall cite such person to appear before such court or judge to answer such question or to produce such records and papers.

(l) The commissioner shall adopt regulations, in accordance with the provisions of chapter 54, **[**to carry out the provisions of this section and to ensure the fairness of the audit process, including, but not limited to, the sampling methodologies associated with the process**]** that shall include, but not be limited to: (1) Definitions of the statistically valid sampling and extrapolation methodologies to be used, (2) limitations on audits to cover only claims paid or costs reported and, whenever possible, include appropriate sample stratification subject to extrapolation, (3) the application of a median rather than an average in any extrapolation involving claims with multiple services, (4) an audit period in accordance with this section, and (5) administrative appeal procedures set forth in a manner that is consistent with the provisions of this section. The commissioner shall provide free training to facilities on the preparation of cost reports to avoid **[**clerical**]** errors and shall post information on the department's Internet web site concerning the auditing process and methods to avoid **[**clerical**]** errors. Not later than April 1, 2015, the commissioner shall establish audit protocols to assist facilities subject to audit pursuant to this section in

developing programs to improve compliance with Medicaid requirements under state and federal laws and regulations, provided audit protocols may not be relied upon to create a substantive or procedural right or benefit enforceable at law or in equity by any person, including a corporation. The commissioner shall establish and publish on the department's Internet web site audit protocols for: **[**(1)**]** (A) Licensed chronic and convalescent nursing homes, **[**(2)**]** (B) chronic disease hospitals associated with chronic and convalescent nursing homes, **[**(3)**]** (C) rest homes with nursing supervision, **[**(4)**]** (D) licensed residential care homes, as defined in section 19a-490, and **[**(5)**]** (E) residential facilities for persons with intellectual disabilities that are licensed pursuant to section 17a-227 and certified to participate in the Medicaid program as intermediate care facilities for individuals with intellectual disabilities. The commissioner shall ensure that the Department of Social Services, or any entity with which the commissioner contracts to conduct an audit pursuant to this section, has on staff or consults with, as needed, licensed health professionals with experience in treatment, billing and coding procedures used by the facilities being audited pursuant to this section."

This act shall take effect as follows and shall amend the following sections:		
Section 1	*July 1, 2015*	17b-99(d)
Sec. 2	*July 1, 2015*	17b-99a